Before the
FEDERAL COMMUNICATIONS COMMISSION

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In the Matter of	)	
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Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
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In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992:	)	MM Docket No. 92-260
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Cable Home Wiring	)	

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COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION ON FURTHER NOTICE OF PROPOSED RULEMAKING

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COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION ON FURTHER NOTICE OF PROPOSED RULEMAKING

The Cable Telecommunications Association ("CATA") submits these comments on the FCC's Further Notice of Proposed Rulemaking in this proceeding.[1] CATA is a trade association representing owners and operators of cable television systems serving approximately 80 percent of the nation's more than 66 million cable households. CATA files these comments on behalf of its members, who will be directly affected by the Commission's actions.

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[1] In the Matter of Telecommunications Services Inside Wiring, Customer Premises Equipment; In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, CS Docket No. 95-184 and MM Docket No. 92-260, FCC 97-304 (rel. August 28, 1997) ("Further Notice").

INTRODUCTION AND SUMMARY

CATA strongly opposes the proposals regarding home run wiring contained in the Further Notice. The FCC has no statutory authority to require cable operators to dispose of their home run wiring as proposed in the Further Notice. In fact, specific provisions of the Communications Act, the 1992 Cable Act, and the Telecommunications Act of 1996 affirmatively indicate that the Commission's authority over MDU wiring stops at the current demarcation point at the tenant's individual dwelling.

Congress has declined to give the FCC such authority for good reason. Absent FCC procedures regulating disposition of a cable operator's MDU home run wiring, new entrants will compete using a second set of wires. Two-wire competition within MDUs will promote true head-to-head competition and choice at the subscriber level, rather than at the MDU-owner level where factors such as prices charged to tenants, quality of video programming, and customer service take a back seat to the premium paid to the landlord. A second set of wires also makes possible competition to deliver Internet access, telephony, and other non-video services that many cable operators currently provide and others intend to provide over the wires the Commission now seeks to transfer to cable operators' competitors.

If the FCC nevertheless decides to adopt its proposals, CATA suggests several modifications. First, the Commission should not adopt any presumption against a cable operator's right to remain on the premises. The FCC recognizes that state law determines whether the procedures leading to expeditious divestment of the operator's wiring are even available, but then without any sound reasoning suggest that it may adopt a presumption that would dramatically interfere with state laws. Cable operators may have substantive rights under state statutory law and state court interpretations of contracts and general landlord-tenant law that the FCC should not preempt through a presumption.

Second, the FCC should adopt a default price where parties negotiating for the sale of inside wiring cannot agree on a price. It is highly unlikely that cable operators will ever be able to secure a fair price under the Commission's procedures, which severely handicap cable operators' ability to negotiate a fair price by imposing a stark choice, under impossible deadlines, to sell, remove, or abandon their wires. If the FCC puts cable operators in this artificial negotiating environment, it should at least make sure they are adequately compensated.

Third, the FCC should lessen the incentive of unscrupulous landlords to use the proposed procedures solely to obtain a premium for granting exclusive rights to provide video service to their MDUs by limiting its proposed procedures to situations where no premium is paid. Without the prospect of a big payoff, landlords will be more likely to use the substantial power granted by the Commission only to further the best interests of their tenants. The FCC cannot lose sight of the fact that it is not charged with protecting the interests of MDU owners, but their tenants as subscribers to video services.

ARGUMENT

I. The FCC Lacks Legal Authority To Require Cable Companies To Sell Or Abandon Their Home Run Wiring In The Common Areas Of MDUs.

The FCC asserts authority to adopt rules governing disposition of home run wiring in MDUs under Sections 4(i)[2/] and 303(r)[3/] of the Communications Act.[4/] The FCC at least

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[2/] Communications Act, § 4(i), 47 U.S.C. § 154(i).

[3/] Communications Act, § 303(r), 47 U.S.C. § 303(r).

[4/] Further Notice ¶ 54.

recognizes that Sections 4(i) and 303(r) provide very general authority that does not reach cable companies' home run wiring unless other, more specific authority exists, and only if such authority would be consistent with other provisions of the Communications Act.[5/] The FCC searches for authority over home run wiring in (1) its explicit authority under Section 624(i) over home wiring inside each MDU tenant's premises;[6/] (2) the FCC's general charge to regulate communications by wire, promote competition, and regulate other areas of cable service;[7/] and (3) its specific authority under Section 623(b) over cable rate regulation.[8/] The FCC puts most of its stock in the rate regulation argument.

The Commission cannot claim such a tenuous basis for extending its authority. Although the FCC appears to understand that it cannot regulate on the basis of Section 4(i) alone, it misapprehends the extent to which it must locate additional supporting authority. The Commission asserts that the D.C. Circuit's Mtel case allows it to act in any area and on any issue tangentially related to one of the FCC's legitimate functions.[9/] In that case, however, the Court found that the FCC was vested with separate, direct statutory authority to issue licenses, such as the license at issue, which included the authority to impose conditions on the grant of licenses,

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5/ See id. ¶¶ 54-55. As noted below, however, the FCC misstates the requirement that 4(i) jurisdiction not be "inconsistent" with any other provision, characterizing this requirement as "not expressly prohibited." See id.

6/ See id. ¶¶ 56, 60-61.

7/ See id. ¶¶ 57, 58.

8/ See id. ¶¶ 58-60.

9/ See Further Notice ¶ 55 (citing Mobile Communications Corp. of America v. FCC, 77 F.3d 1399 (D.C. Cir.) ("Mtel"), cert. denied, 117 S.Ct. 81 (1996)).

such as the payment obligation at issue.[10] Thus, Mtel was no different than a host of cases before it that establish the limits of the FCC's 4(i) authority.[11]

The recent Iowa Utilities Board decision reaffirmed that the FCC must have an additional, clear source of authority before it may regulate in a particular area.[12] CATA believes that, in that case, the Eighth Circuit wrongly ignored a clear source of authority supporting the FCC's 4(i) jurisdiction – its pervasive authority over interconnection conferred by Section 251 of the Telecommunications Act of 1996. With respect to home run wiring, however, the Commission's asserted bases of authority are much more attenuated and are belied by statutory provisions that specifically provide the FCC only with authority over cable wiring in the interior of the subscriber's premises. In this case there is a specific and clearly articulated area of FCC authority. The Commission cannot simply expand that area on its own. Courts look to the statutory authority, not self-proclaimed omnipotence.

The Further Notice also substantially discounts the effect of "inconsistent" statutory provisions on the FCC's jurisdiction under Section 4(i). In the Commission's view, the term "not inconsistent" used in Section 4(i) means "not expressly prohibit[ed],"[13] and expansion of

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[10] Mtel, 77 F.3d at 1406.

[11] See Telecommunications Research & Action Center v. FCC, 836 F.2d 1349, 1361 (D.C. Cir. 1988); North American Telecommunications Ass'n v. FCC, 772 F.2d 1282, 1292 (7th Cir. 1985); AT&T v. FCC, 482 F.2d 865, 876-77 (2d Cir. 1973); see also United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968) (FCC jurisdiction under 4(i) must be ancillary to another grant of jurisdiction); FCC v. Midwest Video Corp. 440 U.S. 689 (1979) (same).

[12] Iowa Utilities Bd. v. FCC, 120 F.3d 753, 805 (8^{th} Cir. July 18, 1997).

[13] Further Notice ¶ 54; see id. ¶ 63.

the FCC's jurisdiction may be thwarted only by statutory provisions that expressly deny such authority to the FCC. The Commission does not and cannot cite to any statute, legislative history, or court decision for its expansive view of its jurisdiction.

The Commission's first asserted basis of authority, Section 624(i) of the Communications Act, cannot be read to supply the necessary supplemental authority. Section 624(i) in fact affirmatively demonstrates that Congress terminated the FCC's authority at the subscriber's premises, and any attempt to regulate beyond that point would be inconsistent with the specifically limited grant of authority to the FCC. Section 624(i) explicitly addresses the FCC's authority over cable wires, and only grants the FCC authority to "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator <u>within the premises of such subscriber</u>."[14/] Although the language of Section 624(i) is plain and limiting, its meaning is reaffirmed by the legislative history. A House of Representatives Report leading to the adoption of Section 624(i) further clarifies that the FCC's jurisdiction under Section 624(i) to prescribe rules regarding the disposition of cable wiring stopped at "the interior premises of the subscriber's dwelling unit":

> [T]his section limits the right to acquire home wiring to the cable installed within the interior premises of a subscriber's dwelling unit.
>
> * * *
>
> This section deals with internal wiring within a subscriber's home or individual dwelling unit. <u>In the case of multiple dwelling units, this section is not intended to cover common wiring within the building</u>, but only the wiring within the dwelling unit of individual subscribers.[15/]

[14/] Communications Act, § 624(i), 47 U.S.C. § 544(i) (emphasis added).

[15/] H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) at 118-119.

The FCC's second basis of jurisdiction, that assertion of authority regarding home run wiring is necessary to its general charge to regulate communications by wire and other, unrelated areas of cable service, as well as generally promote competition, is far too vague and attenuated. If the Commission had the jurisdiction it claimed, it would be able to adopt any rule not specifically contradicted by an explicit statutory provision because some fanciful connection, such as the FCC draws in the Further Notice, could always be drawn to such bases of authority. This is simply not the law.

The Commission's third basis for asserting jurisdiction, Section 623(b), governing rate regulation, cannot be read to supply an adequate basis for Section 4(i) authority. As a threshold matter, the FCC acknowledges that provisions governing cable wiring are found only "in Section 624, which sets forth the existing wiring provisions . . . ."[16/] The specificity of Section 624 with regard to the inside wiring within the FCC's jurisdiction goes beyond the expressio unius maxim, because it sets a specific demarcation point which the Commission is now attempting to cross.

Notwithstanding the FCC's tortured attempt to include disposition of inside wiring under its statutory rate regulation authority,[17/] the language of Section 623(b) plainly does not sweep disposition of inside wiring equipment upon termination of service to an MDU under the rubric of cable rate regulation. Rather, Section 623(b) is limited to "installation and lease of the equipment." This makes sense, because disposition of inside wiring is, as the FCC admits, addressed in Section 624. Under any interpretation of the "plain meaning" of the statutory language, the Commission's overreaching here is plain.

[16/] Further Notice ¶ 67.

[17/] See id. ¶ 58.

The FCC has fully addressed any rate concerns related to inside wiring by reducing installation charges to cost, so there is no need to address such concerns through the roundabout method of forcing cable operators to sell their wiring to new entrants. Congress gave no indication that it was concerned in the 1992 Cable Act as to the pricing of inside MDU wiring. Nor did it indicate when it enacted the 1996 Act that it was concerned that rates charged by cable operators to new entrants for MDU wiring were or would be set too high. The 1996 Act not only fails to confer additional authority to the FCC over pricing of inside wiring, its only specifically expressed concern with regard to cable rates in the MDU context is that cable rates for MDU tenants will be set too low.[18/]

Section 623 only protects the cable "subscriber," which is defined to exclude building owners and others who redistribute signals.[19/] The FCC's proposed procedures in this docket do anything but protect the subscriber, because they discourage new entrants from installing a second wire that would increase subscriber choice and head-to-head competition at the subscriber, as opposed to MDU owner, level.

The FCC's assertion of jurisdiction over home run wiring by reference to its authority to regulate rates is particularly misplaced considering Congress's "'preference for competition' over regulation in setting rates for cable services."[20/] Instead of heeding this preference, the FCC prefers regulation that will leave incumbent cable operators at an unfair competitive disadvantage with respect to new entrants based on the actions of unscrupulous landlords.

[18/] See 47 U.S.C. § 543(d) (predatory pricing).

[19/] See 47 C.F.R. § 76.5(ee).

[20/] Further Notice ¶ 60 (quoting 47 U.S.C. § 543(a)).

II. A Presumption That An Existing Video Provider Does Not Have The Legal Right To Remain On The Premises Would Interfere With 50 Individual State Legal Schemes Governing Landlord-Tenant Relations.

The Further Notice purports to address merely the "procedural mechanisms" for quickly disposing of inside wiring that the cable operator may no longer use for cable service.[21/] It disavows any intent "to preempt an incumbent's ability to rely upon any rights it may have under state law."[22/] Nevertheless, the Further Notice also seeks comment on whether to adopt "a presumption that the incumbent does not possess an enforceable legal right to maintain its home wiring on the premises (and therefore that our proposed procedures would apply), unless the incumbent can adduce a clear contractual or statutory right to remain."[23/] Thus, the FCC would put the onus on the cable operator to affirmatively establish its rights under state statute or contract, or it will lose its wiring under the "procedures" established by federal regulation.

Cable operators' contractual rights aside, a number of states have enacted access-to-premises statutes, which afford cable operators substantial rights to remain on the premises against the will of the MDU owner. These statutes were enacted for the benefit of MDU tenants, to ensure that MDU owners cannot deprive them of cable service. Access-to-premises statutes enable and encourage two-wire competition within MDUs, which increases head-to-head competition and subscriber choice. Rather than adopt a federal presumption that cable operators

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21/ Further Notice ¶ 34; see id. ¶¶ 32 ("We believe that these procedural mechanisms will not create or destroy any property rights . . . ."), 47 ("the rules we propose do not grant MDU owners any additional rights, but simply establish a procedural mechanism for MDU owners to enforce rights they already have").

22/ See id. ¶ 34.

23/ Id.

and tenants do not have access-to-premises rights in these or other states, the FCC should be proposing rules to encourage two-wire competition in non-access-to-premises states.

The FCC cannot hold itself out as an expert in the landlord-tenant laws of 50 states. This is a highly complex area of law in which state legislatures and state courts have made a host of individualized determinations from access-to-premises statutes to bans on landlord compensation for entry.

The proposed FCC procedures have a definite substantive impact: the cable operator loses its wiring. For this reason, the Commission should not adopt a threshold presumption that the cable operator has no substantive right to prevent this from happening. Rather, this determination should be made by a competent state court if the incumbent seeks such a determination. If not, the cable operator's rights under state law will be obviated by federally-imposed "procedures" that presume that a cable operator has no state right. Thus, regardless of the procedural label, the FCC's proposals would abridge substantive rights and therefore have a preemptive effect-which the Commission has specifically stated it has no intention of doing. The correct course of action, thus, is simple: don't do it.

Moreover, many cable operators use or plan to use their existing wiring for a host of other advanced video and telecommunications services, such as access to the Internet, telephony, access to electronic databases, home banking, and other information services. Even if a subscriber decides to terminate a cable operator's video service, the operator's inside MDU wire could still be used to deliver other telecommunications services to the same customer. The FCC has no basis to presume that the cable operator should immediately leave the premises and deprive subscribers of an opportunity to receive these valuable services.

The Commission says it does not intend to preempt state law. This proposal would clearly create massive litigation by creating precisely that preemptive effect. It would abridge substantive rights and far exceed any authority the FCC may have. This proposal should be abandoned.

III. A Reasonable Default Price Is Necessary To Insure Fairness And Rapid Competitive Entry Where The Existing Video Provider Elects To Sell Its Inside MDU Wiring But The Parties Cannot Agree On A Price.

The FCC asks "whether market forces would provide adequate incentives for the parties to reach a reasonable price. If market forces are insufficient, we seek comment on how a reasonable price should be established."[24/] The FCC proposes to adopt broad guidelines, a default price, or a formula for determining the price.[25/]

The FCC's procedural mechanisms for disposing of existing cable wiring completely distort the market forces that normally govern the sale of inside MDU wiring. Negotiations are skewed by the desperate circumstance of the cable operator, which benefit the MDU owner or new video provider and artificially reduce the selling price. The cable operator is being forced to leave, the cost of removing the wire is expensive and sometimes prohibitively expensive, and the cable operator must remove or sell the wire under extremely short deadlines or be deemed to abandon it.

Negotiations will therefore rarely, if ever, produce a reasonable price and will always disadvantage the incumbent cable operator that is being forced to dispose of its wiring. The FCC

24/ Further Notice ¶ 37 (building by building); see id. ¶ 40 (unit by unit).

25/ Id. ¶ 37.

proposals therefore create the equivalent of a taking.[26] The FCC should adopt a mechanism to ensure a fair price. The most workable mechanism would be a default price if the parties cannot reach an agreement.

A default price will soften the loss of facilities investment shouldered by existing operators by guaranteeing that they get at least some compensation. Absent a default price, new entrants will target MDUs where existing wiring would be most expensive for the incumbent to remove and therefore where their chances are consequently greater to extort a price below replacement cost. Cable operators will be reluctant to wire upgrade their existing MDU wiring if they stand to lose their investment based on the whim of the MDU owner. The subscriber, in addition to the cable operator, pays the price for such an FCC policy, which would be a disincentive to future MDU wiring improvements.

The default price should reflect the actual cost to replace inside wiring, and be determined on the basis of units passed. Cable operators as well as new entrants wire the entire building at once, rather than installing wire to an individual unit when the tenant initiates service. Cable companies have submitted cost estimates of between $150 and $300 per unit passed.[27] Cable's competitors, such as ICTA, DIRECTV and USSB, have actually submitted estimates that are higher. The fact that these estimates were submitted to show the cost of placing a second wire in the MDU does not detract from their usefulness to set a fair price on the existing cable

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[26] See Comments of the Cable Telecommunications Association at 6-8 (filed Mar. 18, 1996), In the Matter of Telecommunications Service Inside Wiring; Customer Premises Equipment, CS Docket No. 95-184.

[27] See e.g., Attachment 1 to Ex Parte Letter from Elizabeth A. Losinski, Director of Regulatory Affairs, Cablevision, at 1 (Feb. 5, 1997), attached to Ex Parte Letter from Frank W. Lloyd, Esq., to William F. Caton, Acting Secretary, FCC (Feb. 11, 1997).

wire. For example, according to ICTA, on whose proposal the FCC seeks comment, "the fixed costs involved in installing a complete stand-alone system at an MDU is [sic] approximately $500 per passing . . . ."[28] OpTel's counsel estimated that the cost for "prewire and distribution" where an SMATV operator must completely replace existing cable plant is $360 per unit passed.[29] DIRECTV offered a similar analysis,[30] and USSB's Director of Commercial Business estimated that "wiring costs can range from $50 to $600 per unit passed...."[31]

The default price must be based on replacement cost, rather than original cost less amortization. Cable operators may have to replace such wiring themselves, at full cost, when they return to the MDUs to provide services other than traditional cable service, such as Internet access, other two-way services, or telephony, or, indeed, when there is competition within the MDU for individual cable customers. Allowing new video providers and property owners to purchase the wiring for anything less than its replacement cost would bestow on them a substantial windfall, and, again, would be an unlawful "taking."

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[28] See Ex Parte Letter from Deborah C. Costlow, Esq., to William F. Caton, Acting Secretary, FCC, attachment at 3 (Feb. 6, 1997).

[29] Attachment A, Cost per Unit Analysis, Conversion with complete replacement of existing cable plant, attached to Ex Parte Letter from Henry Goldberg, Esq., to Chairman Reed E. Hundt, FCC, at 3 (Feb. 7, 1997).

[30] Ex Parte Letter from James F. Rogers, Esq., to William F. Caton, Acting Secretary, FCC, at 3 (Apr. 28, 1997).

[31] Alan Breznick, DBS Zeroes In on the MDU Market, CABLE WORLD, Mar. 27, 1997, at 59.

IV. The Proposed Procedures For Disposing Of Inside Wiring Should Not Be Available To An MDU Owner That Receives A Premium For Allowing A New Video Provider Into Its Building.

The FCC's proposed procedural mechanisms will create a powerful tool to enable landlords to auction the exclusive right to serve their buildings to the highest bidder. The new video provider will be happy to pay such a premium because it will be able to obtain the incumbent cable operator's existing wiring at a fraction of its value. The mere threat of an auction will be enough to subject the incumbent cable operator to a shakedown by the landlord. It is not hard to imagine a landlord demanding from the incumbent provider a payment for not forcing the cable operator out and obtaining its existing wiring at little or no cost.

Other than the incumbent cable operator, clear losers under this incentive system are the subscriber-tenants. As CATA observed in earlier comments filed in this proceeding, "Does the Commission believe that when a building owner's palm is crossed with silver the best interests of the subscribers have been satisfied?"[32/]

The Further Notice summarily rejects cable operators' warnings that the FCC should not afford landlords too much power to assume a gatekeeper function, on the assumption that in any areas "where the real estate market is competitive it will discourage MDU owners from ignoring their residents' interests."[33/] The Commission's reasoning is insufficient to support its landlord-friendly proposals.

First, the FCC has not determined what percentage of the MDU real estate market is "competitive" and whether the non-competitive percentage is sufficiently small to justify

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[32/] Comments of the Cable Telecommunications Association at 5 (filed Mar.18, 1996), In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, MM Docket No. 92-260.

ignoring those subscribers' interests. The FCC is not an expert agency in the MDU housing field. Second, it is naïve to believe that landlords, even in competitive real estate markets, will always choose tenant preference over a kickback for granting exclusivity. There is insufficient evidence in the record of this proceeding to suggest that a tenant's choice of MDU is sufficiently affected by the type of wired video service available that landlords are inhibited from pursing their own financial ends in bargaining for a new MDU video provider.

If the FCC is really concerned with protecting the interests of subscribers, it must seek to remove any incentive on the part of the landlord to act contrary to its tenants' interests. One important step would be to make its proposed procedures unavailable where the landlord does in fact receive a premium from the new video provider. Such a condition for invoking the procedures proposed by the Further Notice would lessen the likelihood that landlords would use their substantial procedural advantage over cable operators to further their own interests and not subscriber choice.

[33/] Further Notice ¶ 47.

CONCLUSION

For these reasons, CATA asks the Commission to reexamine its claimed jurisdiction over home run wiring and conclude that it has no such authority. If the Commission nevertheless decides to regulate the disposition of home run wiring, it should not upset cable operators' existing rights under state law by adopting any presumptions, should set a default price when price negotiations inevitably fail, and should deny use of its procedures for forcing divestiture of cable inside wiring where the landlord receives a premium from the new provider.

Respectfully submitted,

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